

Sir ALEXANDER GILMOUR of *Craigmillar* Baronet, and his } Appellants.
Guardians, ---

Lieutenant Colonel JAMES ROSS of *Balnagown*, --- Respondent.

The Respondent's CASE.

THE late General *Charles Ross*, of *Balnagown*, having no Issue, and meaning to settle his Estate upon his Relations after his Death and provide for Payment of his Debts and Legacies, made the following Settlement in Nature of a strict Entail.

"In Favours of, and for new Infeftment of the same to be made, and granted to myself, and the Heirs to be procreated and descending of my Body, (the eldest of the Heirs Female succeeding without Division :) *Whilks* failing, to *Charles Ross*, second Son to *George Master of Ross*, who is only Son to *William Lord Ross*, my Brother, and the Heirs-Male to be procreate of the said *Charles Ross* his Body, and the Heirs Male of their Bodies: *Whilks* failing, to *George Ross*, third Son to the said *George Master of Ross*, and the Heirs-Male to be procreate of his Body, and the Heirs-Male of their Bodies: *Whilks* failing, to the other younger Sons procreate, or to be procreate of the Body of the said *George Master of Ross*, one after another, successively in their Order, according to the Priority of their Birth, and the Heirs-Male of their Bodies: *Whilks* failing, to the said *George Master of Ross* himself: *Whilks* failing, to the younger Sons to be procreate of the Body of *William Ross*, eldest Son to the said *George Master of Ross*, one after another successively in their Order, according to the Priority of their Birth, and the Heirs-Male of their Bodies: *Whilks* failing, to the said *William Ross*, eldest Son to the said *George Master of Ross*, and the Heirs-Male of his Body, (with, and under the Provision aftermentioned, in relation to the said Persons and Heirs their denuding in Favours of a second or younger Son, in manner after specified.) And failing of all these Persons, and Heirs, to *Charles Gilmour*, second lawful Son to *Sir Alexander Gilmour*, of *Craigmillar*, procreate betwixt him, and *Dame Grizel Ross*, his Spouse, my Sister, and the Heirs-Male to be procreate of the Body of the said *Charles Gilmour*, and the Heirs-Male of their Bodies, (with and under the Provision after express, in relation to the said *Charles Gilmour*, and his said Heirs, their Succession to my Estate, when it shall happen that they also succeed to the Estate of the said *Sir Alexander Gilmour*, as is hereafter mentioned.) *Whilks* failing, to *James Lockhart*, (the Respondent) second Son to *Sir James Lockhart*, of *Carstairs*, procreate betwixt him, and *Dame Grizel Ross* his Spouse, third Daughter to the said *William Lord Ross*, and the Heirs-Male to be procreate of the said *James Lockhart* his Body, and the Heirs-Male of their Bodies: *Whilks* failing, to *George Lockhart*, third Son to the said *Sir James Lockhart*, and the Heirs-Male to be procreate of his Body, and the Heirs-Male of their Bodies: *Whilks* failing, to *Charles Lockhart*, fourth Son to the said *Sir James Lockhart*, and the Heirs-Male to be procreate of his Body, and the Heirs-Male of their Bodies: *Whilks* failing, to *John Lockhart*, fifth Son to the said *Sir James Lockhart*, and the Heirs-Male to be procreate of his Body, and the Heirs-Male of their Bodies: *Whilks* failing, to *Thomas Lockhart*, sixth Son to the said *Sir James Lockhart*, and the Heirs-Male to be procreate of his Body, and the Heirs-Male of their Bodies: *Whilks* failing, to any other younger Sons procreate, or to be procreate betwixt the said *Sir James Lockhart*, and *Dame Grizel Ross*, his Spouse, one after another, successively in their Order, according to the Priority of their Birth, and the Heirs Male of their Bodies, with and under the Provision after express, in relation to the Succession of the Sons of the said *Sir James Lockhart*, and their Heirs, when it shall happen that they also succeed to the Estate of the said *Sir James*, as is hereafter mentioned: *Whilks* failing, to the younger Sons of *George Lord Ramsay*, eldest lawful Son to *William Earl of Dalhousie*, procreate betwixt the said Earl, and *Mrs. Jean Ross*, his Spouse, my Sister, one after another, successively in their Order, according to the Priority of their Birth, and the Heirs Male of their Bodies; (with, and under the Provision after mentioned, in relation to their being Peers) as is after express. *Whilks* failing, to *Jean Ross*, eldest Daughter to the said *George Master of Ross*, and the Heirs-Male to be procreate of her Body, and the Heirs-Male of their Bodies: *Whilks* failing, to *Elizabeth Ross*, second Daughter to the said *George Master of Ross*, and the Heirs-Male to be procreate of her Body, and the Heirs-Male of their Bodies: *Whilks* failing, to *Margaret Ross*, third Daughter to the said *George Master of Ross*, and the Heirs-Male to be procreate of her Body, and the Heirs-Male of their Bodies: *Whilks* failing, to the other Daughters procreate, or to be procreate of the Body of the said *George Master of Ross*, successively, in their Order, according to the Priority of their Birth, the eldest secluding the rest, and succeeding without Division, and the Heirs-Male of their Bodies, (with, and under the Provision after specified, in relation to the said Daughters, their being married to a Peer, or the eldest Son of a Peer, as underwritten.) *Whilks* failing, to the younger Sons of *William Earl of Kilmarnock*, only Son procreate betwixt the deceased *William Earl of Kilmarnock*, and *Eupham Countess of Kilmarnock* his Spouse, eldest Daughter to the said *William Lord Ross*, one after another, successively in their Order, according to the Priority of their Birth, and the Heirs Male of their Bodies, with, and under the Provision after mentioned, in relation to their being Peers, as is hereafter express." (*Whilks* failing, to several others of the Name of *Ross*, Kinsmen of the deceased *David Ross*, of *Balnagown*, and the Heirs-Male of their Bodies. Remainder to *Lord John*, *Lord Edward*, and *Lord Frederick Murrays*, younger Sons of the Duke of *Atholl*, and their Heirs-Male.---With several other Remainders over.) "Provided and Declared that my Lands and Estate above mentioned, and the Lands and Estate that now is belonging, or that shall hereafter belong to the said *William Lord Ross*, *George Master of Ross*, and their Heirs, shall never be enjoyed, and possessed by one and the same Person; but that my said Estate, and the Estate of the Lord *Ross*, and *Master of Ross*, shall be separately enjoyed by different Persons, except when there is only one Son of the Family of the Lord *Ross*, who will succeed to the Estate, and Dignity of that Family, and will also (through the Want of more Sons) succeed to my Estate in Virtue of the Tailzie, and Substitution above-mentioned. But when, and how oft-soever my said Estate shall, in Virtue of the said Tailzie, and Substitution be enjoyed, and possess by one and the same Person, that succeeds to, and is possess of the Estate of the Lord *Ross*, and *Master of Ross*, by Reason of there being but one Son of that Family, as aforesaid; the Person succeeding to, and possessing both Estates, shall be bolden, and obliged to denude himself of the Right of my Lands and Estate, in Favours of his younger Sons, one or more, immediately upon their Existence, successively in their Order, the one after the other, according to the Priority of their Birth, and in Favours of the other Heirs of Tailzie above specified, with and under the haill Conditions, and Provisions

" of

August,
27.

tailzie, of the
late of Balna-
own, under
which both Par-
ties claim.

Additional Re-
sponder to the
Appellant's Fa-
vor, and his
sole Issue.

Remainder in
Favor of the
Respondent.

Condition on
which Sir Cha.
Gilmour, and
his Descendents
could be capable
of succeeding to
the Entail Estate.

“ of this present Tailzie; but yet the eldest and only Son of the Family of the Lord Ross is to return to the Succession
“ of my Estate, whensoever the younger Sons of that Family, and the Heirs-Male of their Bodies shall fail: And it is
“ hereby Declared, that as the Father of these younger Sons thus obliged to denude, shall not be accountable
“ for the Rents of my Estate, during his Possession, before the Existence of his younger Sons, one or more,
“ so he shall have no Right to my Estate from the Existence of a younger Son procreate of his Body; but his Right
“ to my Estate shall from thenceforth cease, and be extinct, void, and null; and it shall be lawful to the
“ eldest of the said younger Sons to procure himself served, retoured, infest and seized in my Estate, as Heir
“ of Tailzie to the Person who was last infest before his Father, or the said younger Son may obtain Adjudi-
“ cation, Declarator, or use any other Method of the Law for adjudging and declaring my Estate to belong to
“ him, and for his attaining the Possession thereof; but yet it is Provided and Declared, in the foresaid Case of
“ the Father's being obliged to denude in Favours of his younger Sons, or of the younger Sons their serving
“ Heir of Tailzie, or declaring their Right: that then the Father, thus losing his Right to my Estate, shall
“ have Right to the Half of the Free Rent thereof (when and after Stipends, Cesses, publick Burdens,
“ Allocations to Husbands, Wives, Daughters, and younger Children hereafter mentioned, waste Rooms,
“ Loss by Tenants, and Charges in uplifting the Rents, are all deduced) and that yearly, until his younger
“ Son succeeding to my Estate, shall arrive at the Age of fifteen Years; and the said Father shall have Right
“ to the fourth Part of the Free Rents of my Estate (deducing as aforesaid) yearly, from his younger Son,
“ succeeding to my Estate, his Age of fifteen Years, until his Age of Twenty-one Years, or his Marriage,
“ which soever shall first happen; but the Father shall be obliged to uplift the Rents so allotted to him from the
“ Tenants yearly out of their current Rents, and the Son succeeding, and his Heirs, shall not be personally
“ bound for the same, neither shall the Property of my Estate be any ways burthened or affected therewith:
“ declaring always, that in Case the said Father shall not denude in Favours of his younger Son, as is above
“ provided, and shall not infest him in my Estate within one Year after his Existence, then and in that
“ Case the Father shall amit, lose and tyne his Right to the Half and Fourth Part of the Rents respectively
“ provided to him as above-mentioned, and the whole Rents of my Estate shall belong to the younger Son from
“ his Existence. Item, It is hereby expressly Provided and Declared, That whensoever the said Charles Gilmour,
“ or his Heirs above mentioned, succeeding to, and possessing my Estate, shall also succeed to the Estate now belonging
“ to the said Sir Alexander Gilmour, then and from thenceforth the Right of my Estate in their Favours, shall cease
“ and be extinct, void and null, and the same shall fall, and pertain to the next Heirs of Tailzie appointed to
“ succeed, to whom it shall be lawful to procure themselves served, retoured, infest and seized in my Estate, as Heirs
“ of Tailzie, to the Person who was last infest, before the Person thus succeeding to Sir Alexander Gilmour's
“ Estate, or to obtain Adjudication, Declarator, or use any other Method of the Law as aforesaid; and my
“ Estate shall not return to any of the Descendents of the said Charles Gilmour, upon the Existence of younger Sons,
“ after once the Estate of Sir Alexander Gilmour, and my Estate shall happen to devolve upon one and the same
“ Person, and after the said Person, succeeding to both Estates, shall lose his Right to my Estate as aforesaid. ITEM,
“ In the same manner, it is hereby expressly provided and declared, that whensoever any of the Sons of Sir
“ James Lockhart, of Carstairs, or their Heirs succeeding to and possessing my Estate, shall also succeed to the
“ Estate now belonging to the said Sir James Lockhart, or that shall hereafter belong to his Heirs, then, and
“ from thenceforth, the Right of my Estate, in Favours of the Sons of the said Sir James Lockhart, and their
“ Heirs, shall cease and be extinct, void and null, and never thereafter revive or return to any of their
“ Descendents; but the same shall fall and pertain to the next Heirs of Tailzie, appointed to succeed next to
“ the Sons of the said Sir James Lockhart, and their Heirs, who may procure themselves served, retoured, infest,
“ and seized, as Heirs of Tailzie to the Person who was last infest, before the Person thus succeeding to Sir
“ James Lockhart, of Carstairs, his Estate: or they may obtain Adjudication, Declarator, or use any other
“ Method of the Law, for adjudging, declaring my Estate to belong to them, and for obtaining Possession
“ thereof. ITEM, It is hereby expressly provided and declared, that the eldest of the Heirs-Female of my own
“ Body, and the eldest of all the other Heirs-Female, appointed to succeed to my Estate, as aforesaid, shall
“ succeed thereto in the Order above set down, without any Division, but secluding the rest of the Females
“ their Sisters, in Manner above specified, and shall be bound and obliged to marry a Gentleman of the Sir-
“ name of Ross, as I here subscribe my Name, conformable to what the Laids of Balnagown have been in
“ Use to do: or who, and the Children to be procreate betwixt them, shall assume that Name, and who shall
“ use, bear, and carry the Title and Arms of Balnagown, and no other Title nor Arms: And in case the said
“ Heirs-Female, and their Husbands, and the Children and Descendents of their Bodies, succeeding to my
“ Estate, shall do in the contrary hereof; then, and in that Case, the Persons so contraveining, and the Heirs of
“ their Bodies, shall amit, tyne, lose and forfeit their Right and Interest in my said Lands and Estate, and the
“ same shall fall and devolve upon the next Heirs appointed to succeed by the aforesaid Tailzie and Substitution,
“ who may obtain themselves served, retoured, infest and seized, as Heirs to the Person who was last infest,
“ before the Contraveiner, or obtain Adjudication, Declarator, or use any other lawful Method for adjudging
“ and declaring my Estate to belong to them, and for attaining Possession thereof. And further, it is hereby
“ expressly provided and declared, That in Case my Heirs-Female, or any of the Heirs-Female appointed to
“ succeed to my Estate, shall marry a Peer, or the eldest Son of a Peer, then and immediately after such Mar-
“ riage to a Peer, or the eldest Son of a Peer, or whensoever their Husbands shall become a Peer, or the eldest
“ Son of a Peer, the Right of my Estate, in Favours of the said Heirs-Female, and the Heirs of their Bodies,
“ shall cease and be extinct, void and null, and the same shall fall and belong to the next Heirs appointed to
“ succeed by the foresaid Tailzie and Substitution, who may establish their Right by Service, Retour, Adjudica-
“ tion, Declarator, or any other Method, as aforesaid. ITEM, It is hereby expressly provided and declared, That
“ in Case the younger Sons of the said George Lord Ramsay, or their Heirs succeeding to my Estate, shall become
“ Peers, or bear the Title of Earl of Dalhousie, or any other Title of Peerage; then, and from thenceforth,
“ the Right of my Estate, in Favours of them and their Heirs, shall cease and be extinct, void and null, and the
“ same shall fall and pertain to the next Heirs appointed to succeed by the foresaid Tailzie and Substitution, who
“ may establish their Right to my Estate by Service, Retour, Adjudication, Declarator, or any other Method,
“ as above specified. ITEM, It is hereby expressly provided and declared, That in Case the younger Sons of
“ the said William Earl of Kilmarnock, or their Heirs, succeeding to my Estate, shall become Peers, or bear the
“ Title of Earl of Kilmarnock, or any other Title of Peerage, then, and from thenceforth, the Right of my
“ Estate, in Favours of them and their Heirs, shall cease and be extinct, void and null; and the same shall fall
“ and devolve upon the next Heirs appointed to succeed by the foresaid Tailzie and Substitution, who may
“ establish their Right to my Estate by Service, Adjudication, Declarator, or otherways, as aforesaid. ITEM,
“ In the same Manner it is hereby expressly provided and declared, That in Case any of the Sons abovenamed
“ of the Duke of Atholl, or their Heirs succeeding to my Estate, shall become Peers, and bear the Title of the
“ Duke of Atholl, or any other Title of Peerage; then, and from thenceforth, the Right of my Estate in
“ Favours of them, and their Heirs, shall cease and be extinct, void and null, and the same shall fall to, and
“ devolve upon, the next Heirs appointed to succeed by the foresaid Tailzie and Substitution, who may establish
“ their

“ their Right to my Estate by Service, Adjudication, Declarator, or otherways, as above written. But yet, and notwithstanding of the Provisions above-mentioned, It is hereby provided and declared, That in Case any of the said Persons, and Heirs-Male, or the Husbands of the Heirs-Female succeeding to my Estate, not Peers at their Succession thereto, shall be created Peers after their Succession to my Estate; then such Creation of Peerage shall not disable them, or their Heirs from enjoying and possessing my Estate; it being only my Intention to debar and exclude therefrom all that are, or shall be created Peers, before they succeed to my Estate, and their Heirs, who have the Right to succeed to their Title of Peerage, that the said Estate may not be sunk in any Title of Peerage pre-existing: Excepting only the Heirs-Male of the Family of Lord *Rofs*, who shall succeed, as appointed by the said Tailzie and Substitution, when there is only one Son of the Family, notwithstanding of their Title of Peerage, which shall no ways debar them from succeeding to, and possessing my Estate. But whensoever the Heirs-Female of the Family of the Lord *Rofs*, shall succeed to the Estate and Honours of that Family; then they, and their Heirs, shall lose their Right to my Estate, which shall pertain and belong to the next Heirs of Tailzie, who may establish their Right as aforesaid. ITEM. It is hereby expressly provided and declared, That in Case a nearer Heir shall exist, after a remoter Heir is possessor of my Estate, who would have succeeded thereto, had he been existing when the Succession opened to that remoter Heir; then, and whensoever such a Case shall happen, the nearer Heir, upon and immediately after his Existence, shall have Right to my Estate, and may establish his Right thereto in his Person by Service, Adjudication, Declarator, or otherwise, as above express: And the Right of the remoter Heir to my Estate shall cease, and become void and null, from the Existence of the nearer Heir; but the remoter Heir shall not be accountable for the Rents before the Existence of the nearer Heir; but only obliged to clear and pay all Stipends, and other Burdens due preceeding that Time. ITEM, It is hereby expressly provided and declared, That the Heirs of my own Body, and the said *Charles Rofs*, Son to *George Master of Rofs*, and his Heirs, and the hail other remanent Persons, and Heirs of Tailzie, Male and Female abovementioned, appointed to succeed to my Estate, shall be holden and obliged, upon their Succession to my Estate, and for all Time thereafter, to bear, use and carry the Sirname of *Rofs*, as I here subscribe the same, and Title of *Balnagown*, and the Arms of the Family of *Balnagown*, and no other Sirname, Title and Arms: And in Case they do in the contrary hereof, the Contraveeners, and the Heirs of their Bodies, shall amit, tyne, lose and forfeit all Right, Title and Interest they have, or may pretend to my said Lands and Estate, and the same shall fall and devolve upon, pertain and belong to the next Heirs appointed to succeed by the Tailzie and Substitution above specified: And it shall be leifom and lawful to the said next Heirs to obtain Declarator, Adjudication upon the said Contravention, declaring and adjudging the Estate to belong to them, or to obtain themselves served, retoured, infest and seised therein as Heir to the Person last infest before the Contraveeners, in respect the Right of the Contraveeners will be resolved and extinct from the time of the Contravention, siklike as if the famen Right had never been: or to use any other Method in Law for settling and establishing the Right of the said Estate in their Persons: But yet it is declared, that so long, and so often as my Estate, and the Estate of the Lord *Rofs* shall be enjoyed and possessed by one and the same Person, as is above provided, it shall be sufficient for that Person to conjoin and quarter the Arms of the Family of *Balnagown* with his own Arms, and to bear and carry the said Arms thus quartered and conjoined: And in Case he do in the contrary hereof, by not bearing and carrying the said Arms quartered and conjoined as aforesaid, then, and in that Case, the Contraveenor, and the Heirs of his Body, shall amit, lose, tyne and forfeit their Right to my Estate, and the same shall fall and devolve upon the next Heir appointed to succeed by the foresaid Tailzie and Substitution, who may establish his Right by Service, Adjudication, Declarator, or any other Method in Law as aforesaid.” Then follow the usual prohibitory, iritant and resolute Clauses for restraining the Heirs of Entail from encumbering or aliening the entailed Estate, and forfeiting such of them as should attempt to do either, with this Distinction. That such of the Heirs as were Descendents of the Entailor's Body, or of the Body of his Brother Lord *Rofs*, should only forfeit for themselves, but not for their Issue: But all the other Heirs of Entail should forfeit for themselves, and for their Descendants, and the Estate should go to the next Remainder-Man: And lastly an annual Sum of £.600 Sterling per Annum is appropriated and vested in Trustees for Payment of his Debts and Legacies, with Power to the Trustees to borrow such further Sum as might be necessary for that Purpose.

This Deed was duly registered, and soon after the making it, *William*, the elder Brother of the said *Charles Gilmour* died without Issue, and their Father, *Sir Alexander*, having likewise died in October 1731, his Estate of *Craigmillar* descended to *Charles*, who was infest and possessed the same to his own Death in August 1750, whereby that Estate devolved on his Son, the Appellant, who likewise has since made up Titles thereto.

General *Rofs* dying in August 1732 without Issue, the Limitation of the Estate of *Balnagown* to *Charles Rofs*, second Son of *George Master of Rofs*, took Place, and he enjoyed the Estate to his Death in 1745. — *Charles's* younger Brothers being dead before him, the Estate devolved on his Father *George Lord Rofs*; and upon his Death to his only Son *William*, last Lord *Rofs*, who survived his Father but a few Weeks, and in him ended the Male-Line of the Family of *Rofs*.

The Respondent being advised that, by the Extinction of *William*, Lord *Rofs's* Male-Line, and *Sir Charles Gilmour's* Succession to his own paternal Estate of *Craigmillar*, he, the Respondent, was, as next Remainder-Man, become intitled to his Estate Tail, took out Brieves for serving himself Heir of Entail to the Estate of *Balnagown*; but, to his great Surprize, an Application was at the same Time made by the Appellant to be served Heir of Tailzie to the said Estate, which necessarily occasioned mutual Actions of Declarator to be brought by both Parties in the Court of Session. — And the Macers of the Court, who, by the Forms of *Scotland*, are Judges of Services, having reported the Claims of the two Competitors, that Report was conjoined to the mutual Actions of Reduction.

The Appellant insisted, that the Remainder to his Father, *Sir Charles Gilmour*, and his Male-Issue, coming next after the Limitations to Lord *Rofs's* Male-Line, which were all at an End by the last Lord *Rofs's* Death, he, as *Sir Charles's* only Son, had unquestionable Right to be served Heir of Tailzie and Provision to the said Estate. — That in one Event, indeed, the Donor had excluded *Sir Charles* and his Issue, viz. In Case he or they, after succeeding to, and possessing the Estate of *Balnagown*, should afterwards succeed to the Estate which then belonged to *Sir Alexander Gilmour*. — But that Event had never happened; the Appellant having first succeeded to, and possessed the Estate of *Craigmillar*, before the Succession opened for him to the Estate of *Balnagown*. — That, farther, neither he or his Father had ever succeeded to any Estate belonging to *Sir Alexander Gilmour*; for long before the Date of the Entail of *Balnagown*, *Sir Alexander* had divested himself of the Fee of his Estate of *Craigmillar* in favour of his eldest Son *John*; and it was to *John*, and not to *Sir Alexander*, that the Appellant's Father succeeded: So that in no Light had the Event happened which was to exclude the Appellant from his Succession to the Estate of *Balnagown*.

The Respondent answered — That the Appellant's Construction of the conditional Limitation to *Sir Charles Gilmour* and his Male-Issue, was not only contrary to the whole Scope and evident Meaning of the Entail, but to the very Words of the Clause referred to: That General *Rofs's* View plainly was to preserve his Family distinct and independent of any other of superior or equal Rank; for which Purpose, after his own Issue, he substituted the

the

the younger Sons of several Families, passing by the eldest, and anxiously providing against the Junction of his Estate with any other, by excluding the younger Sons of those Families whom he had called to his Succession, whenever the Succession to their own Family-Estates opened to them; and but one Exception to this Rule in Favour of his own paternal Family, when there should happen to be one Male only of that Line living, in which Case, a temporary Junction of the *Ross* and *Balnagown* Estates, under many Restrictions, is permitted 'till the Birth of a younger Son, who was *ipso facto* to divest the Father. That this Favour goes no farther: Sir Charles Gilmour's elder Brother was himself passed by, and Sir Charles and his Issue Male called conditionally; that whenever he or they should succeed to the Family-Estate of *Craigmillar*, then, and from thenceforth, the Right in their Favour to the *Balnagown* Estate should cease and become extinct, and the same should fall and pertain to the next Heir of Tailzie appointed to succeed. That the Words of the Clause established this Construction. *Whensoever the said Charles Gilmour, and his Heirs above-mentioned, succeeding to, and possessing my Estate, shall also succeed to the Estate now belonging to the said Sir Alexander Gilmour, and afterwards, my Estate shall not return to any of the Descendants of the said Charles Gilmour upon the Existence of younger Sons, after once the Estate of Sir Alexander Gilmour, and my Estate shall happen to devolve upon one and the same Person, and after the said Person, succeeding to both Estates, shall lose his Right to my Estate as aforesaid.* Those two Parts of the Clause taken together, put the Question beyond a Possibility of Doubt, importing no more than a general Idea of the Co-incidence or Co-existence of these two Events, viz. *The Succession to the Estate of Balnagown, and the Succession to the Estate of Craigmillar*, without regard to Priority of Time, or Distinction which of the Events existed first, or whether they did not both begin to exist at the same Time; as, in the first Part of the Clause, the Succession to the *Balnagown* Estate is mentioned first, and in the latter the Succession to the *Craigmillar* Estate; making it a Matter of Indifference which of the Events happened first, since in both Cases the Consequences would be the same: And, indeed, it would be absurd to imagine General *Ross* meant any Distinction, when the Reason for excluding Sir Charles and his Issue, operated as strongly in the one Case as in the other. That as to the Objection of Sir Charles's taking nothing from his Father, but thro' his Brother, it scarcely deserved a serious Answer: The Father was described of *Craigmillar*: The Appellant claimed as Son of Charles, second Son of Sir Alexander Gilmour of *Craigmillar*: The Family-Estate was known only by the Name of *Craigmillar*, and Sir Alexander was in the Possession of it, tho' under what Restraints might not appear to General *Ross*, nor was it necessary it should, for he had expressed his Meaning clearly to be. That whenever Charles Gilmour, or any of his Descendants, succeeded to the Estate of *Craigmillar*, their Right to the Estate of *Balnagown* should thenceforth cease and determine.

The Respondent, in order to put General *Ross*'s Meaning out of all Doubt, offered to prove, by a Number of Witnesses, all Gentlemen of Credit and Reputation, That the General had frequently explained his Meaning upon the Clause in Question to be as contended for the Respondent: And farther proposed to allow the Appellant a Proof at large, Whether ever the General had expressed an Intent conform to that set up by the Appellant.

Interlocutor
26th, November
1755.
Appealed from.

But the Appellant not demanding such Proof, and the Court thinking it unnecessary under the Circumstances of the present Case, the Lords of Session, of this Date, pronounced the following Interlocutor. "Having advised the mutual Brieves purchased at the Instance of Sir Alexander Gilmour of *Craigmillar*, and Lieutenant Colonel James Lockhart, with the mutual Declarators at the Instance of both Parties, the Tailzie of the Lands and Estate of *Balnagown*, executed by the deceased General Charles *Ross* of *Balnagown*, and whole other Writs produced, and Debate thereon, together with the Cases, Informations, and additional Informations for both Parties, Observations for Sir Alexander, and whole other Proceedings in the Cause; FIND that the said Lieutenant Colonel James Lockhart, is the Person intitled to be served Heir in special to the deceased George Lord *Ross*, in the Lands and Estate of *Balnagown*, in Virtue of the said Tailzie, and decern and delare accordingly; and Affoilzie (acquitt) the said Lieutenant Colonel James Lockhart, from the Declarator brought against him at the Instance of the said Sir Alexander Gilmour and his Curators; and decern and stop all further Procedure in the said Sir Alexander's Service; and remit to the Macers to proceed in the said Lieutenant Colonel Lockhart's Service accordingly."

The Appellant hath thought fit to appeal from this Interlocutor: But the Respondent humbly hopes the same will be affirmed, and the Appeal dismiss'd with Costs, for the following, among other,

R E A S O N S.

I.

This is merely a Question of Construction upon a voluntary Deed in Nature of a testamentary Disposition, wherein the Will of the Donor must be the Rule: Both Parties claim as Donees; other Rights they have none, for neither of them is Heir at Law; so all Arguments of Favour are out of the Case. General *Ross*'s apparent Intent was, to keep the Family of *Balnagown* separate and distinct, and prevent it's being absorbed by a Junction with any other Family: With this View, he calls in, a long Series of younger Brothers, passing by their Elder; and anxiously provides against any Junction of his own, with such younger Brothers Family-Estates, by declaring, that whenever the Succession of their paternal Estates opened to them, their Right to his Estate should thenceforth cease and extinguish. Herein, and in Case of Contravention of his Entail, he makes an Exception in Favour of his Father's Male-Line only, that when it should be reduced to one Male, such one might hold the Estate 'till he should have a younger Son; and any of that Line, contravening his Entail, should forfeit for himself only. But as to all the other Lines, from the Moment any younger Brother becomes eldest or only Son, or from the Moment of his contravening the Entail, such younger Brother loses the Estate irretrievably, without hope of Return to any of his Line. And what puts the General's Intent beyond a Doubt is, that when he afterwards carries on the Substitution to the remaining Male Kinsmen of the ancient Family of *Balnagown*, he drops the Precaution observed as to preceeding Remainder-Men, of Limiting his Estate to the second Sons, and providing against the Junction of his and their Family Estates, as a Thing quite unnecessary, because when any such younger Branch came to be grafted on the Stock, it would of course be lost in the Stock; and therefore the Estate is limited to every such Remainder-Man, and his Heirs Male in course of Seniority, without other Condition than the Preservation of the Entail. This is more than sufficient to manifest his Intent. That whenever Sir Charles Gilmour or any of his Descendants succeeded to the Estate of *Craigmillar*, whether before or after their succeeding to *Balnagown*, the Substitution in his and their Favour of the Latter was to cease, and the Estate go over to the next Remainder-Man.

II.

The chief Stress of the Appellant's Pretence rests on the Word *Possessing* in the above stated Clause, which provides, that when the said Charles Gilmour or his Heirs succeeding to and Possessing my Estate, shall also succeed to the Estate now belonging to Sir Alexander Gilmour &c. Whence the Appellant, by many long and prolix Arguments, endeavoured to shew, that the Case which has happened of his succeeding to *Craigmillar* before he succeeded to and possessed *Balnagown*, was not within the Words or Meaning of the Deed; and therefore he is now at

Liberty

Liberty to hold both.----But this, it's submitted, is not only contrary to the very Words of the Clause, which in the latter Part considers the Devolution of both Estates upon one Person, without respect to Priority as to Time; but contrary to the apparent Intent of the whole Deed; and is endeavouring to introduce a Construction not to support, but to defeat a Donor or Testator's Intent, contrary to all Rules hitherto observed.

- III. It is an absolute Mistake on the Appellant's Part to argue, which he did below, as if he was now to lose and forfeit an Estate whereto he had once a Right: Many Cases were quoted by him to show, that Fetters on Property and penal Clauses are considered in an unfavourable Light, and construed strictly according to the Letter.----But all these are foreign to the present Purpose: The only Question here is, in which of the Parties the Estate vests under the present Circumstances, and which of them is called to General Ross's Succession: Charles Gilmour and his Descendants are called conditionally; therefore if the Condition does not exist, they are not called at all; and there can be no Forfeiture where there was not an antecedent Right.----That the Condition does not exist, in respect of the Appellant, can scarcely admit of a Doubt; and in that Event, the Respondent, the next Remainder-Man, is the first Person called to the Succession of the Estate of *Balangown*.

A. L. FORRESTER.

GILB. ELLIOT.

Die Jovis 12.^o Februarij 1756.

Order'd & Adjdg'd, that the said Appeal be is hereby dismiss'd this House, and that the said Interlocutor therein complain'd of be the same is hereby affirm'd.

Sir Alexander Gilmour of
Craigmillar, Bart, and his
Guardians. } Appellants.

Lieutenant Colonel James
Rols of Balnagown. } Respondent.

The Respondent's CASE.

*To be Heard at the Bar of the HOUSE of LORDS
On Wednesday the 11th Day of February, 1756.*